91-1622 (1)

FILED
MAR 24 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 19 ___
No. _____

RONALD W. GREGORY and DOROTHY L. GREGORY, RONALD W. GREGORY, JR., and GREGORY ESTATE,

Petitioners,

V

UNITED STATES/UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF COLORADO, Jointly, HON. CHARLES E. MATHESON, HON. PATRICIA A. CLARK, HON. SIDNEY BROOKS, ROSS J. WABEKE, Interim Trustee, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, HON, SHERMAN G. FINESILVER, Jointly and Individually,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Ronald W. Gregory, pro se
Dorothy L. Gregory, pro se
Ronald W. Gregory, Jr., pro se
Gregory Estate, pro se
c/o J. Bayne
P.O. Box 29773
Thornton, CO 80229

Dated: March 25, 1992

QUESTIONS PRESENTED FOR REVIEW

I. Whether the complained of acts by judicial defendants were "judicial acts" ?

II. Whether the acts by judicial defendants were acts in "clear absence of all jurisdiction"?

III. Whether a judge has "absolute immunity" when he/she violates a law?

IV. Whether the law empowers a judge to:

A. violate the law while appearing to enforce a law?

B. authorize another (entity) to violate the law while appearing to enforce a law?

V. Whether the United States is "absolutely immune" from liability of employee acts by declaring 'sovereign immunity'?

VI. Whether Ross J. Wabeke is:

A. an agent of the Department of Justice representing the United States and/or

functioning pursuant to authorization of the United States? or

B. an individual, independent contractor, engaged by the United States to perform services for the United States?

VII. Whether a District Court Clerk has authority of law to "expand the court's ruling" in a 'Judgment' issued on District Court Judge's 'Memorandum Opinion and Order'?

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Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners, Ronald W. Gregory, Dorothy L. Gregory, Ronald W. Gregory, Jr., and the Gregory Estate, petitioners herein, pro se, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals For The Tenth Circuit, issued

August 26, 1991, AFFIRMING the memorandum and opinion of the United States District Court for the District of Colorado, issued December 19, 1990, and AFFIRMING the Judgment of the United States District Court Chief Deputy Clerk, which was issued December 27, 1990.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Tenth Circuit in this matter, which affirmed the trial court, is reproduced as Appendix A to this Petition. Gregory v. United States,et al., 942 F.2d 1498 (10th Cir. 1991). The unpublished opinion of the United States District Court is reproduced as Appendix B to this Petition. The unpublished Judgment of the United States District Court Chief Deputy Clerk is reproduced as Appendix C to this Petition.

JURISDICTION

The Petition for Rehearing was denied on November 26, 1991. A Motion for Leave to File Petition for Writ of Mandamus was submitted on February 10, 1992 together with an Ancillary Motion requesting an enlargement of time for which to file a Petition For Writ of Certiorari. Petitioners were granted an extension of time to March 25, 1992 for which to submit their Petition For Writ of Certiorari. The decision of the Court of Appeals was based upon Federal Rules of Civil Procedure 12(b)(1)(5)(6) based on "absolute judicial immunity" and "absolute [quasijudicial] immunity to those executing facially valid judicial orders" and on this Court's decision citing Burns v. Reed, 111 S.Ct. 1934, 1941 (1991), together with other case law.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

A. UNITED STATES CONSTITUTION.

UNITED STATES CONSTITUTION--ARTICLE IV,

Section 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

UNITED STATES CONSTITUTION--ARTICLE VI, paragraph 2:

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;

and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

UNITED STATES CONSTITUTION--FIRST AMENDMENT:

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION--FOURTH AMENDMENT:

The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

UNITED STATES CONSTITUTION--FIFTH AMENDMENT:

No person shall be held to answer for a capital crime, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION--SEVENTH AMENDMENT:

In suits at common law, where the value of controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than

according to the rules of common law.

UNITED STATES CONSTITUTION--FOURTEENTH AMENDMENT: Section 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. STATUTES.

Title 5, United States Code Service, Section 702 states that:

> "A person suffering a legal wrong because of agency action...and stating a claim that ...an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed...".

Title 11, United States Code, Section 323(b):

"The trustee in a case under this title has the capacity to sue and be sued."

Title 11, United States Code, Section 362(a)(4)(5):

"Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 USC 78eee(a)(3), operates as a stay, applicable to all entities, of--
(4) any act to create, perfect, enforce any lien against property of the estate;
(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;..."

Title 11, United States Code, Section 362(d)(2)(B):

"On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--...(2) with respect to a stay of an act against property under subsection (a) of this section, if--...(B) such property is not necessary to an effective reorganization."

Title 11, United States Code, Section 365(d)(1).

"In a case under Chapter 7 of this title, if the trustee does not assume or reject an

executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60 day period, fixes, then such contract or lease is deemed rejected."

Title 11, United States Code, Section 1112(b).

"Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee, and after notice and hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of the creditors and the estate, for cause,..."

Title 11, United States Code, Section 1129;

Title 11, United States Code, Section 3057;

"Bankruptcy investigations.
(a) Any judge...having reasonable grounds for believing that any violation...of... laws of the United States relating to insolvent debtors,...or reorganization plans has been committed, or that an investigation should be had in connection therewith, shall report to the appropriate United States attorney all the facts and circumstances of the case..."

(b) The United States attorney thereupon shall inquire into the facts and report thereon to the judge, and if it appears probable that any offense has been committed, shall without delay, present the matter to the grand jury..."

Title 28 United States Code, Section 959(a):

"trustee may be sued without leave of the court appointing him with respect to any of his acts...such suit is subject to the general powers of the bankruptcy court so far as the same be necessary to the ends of justice, but this shall not deprive a litigant to his right to trial by jury."
[Emphasis Added]

MANNER IN WHICH CONSTITUTIONAL AND STATUTORY CLAIMS WERE RAISED.

After Petitioners Ronald W. Gregory and Dorothy L. Gregory had filed their Chapter 11 Petition under the Bankruptcy Code, they were coerced by their attorneys, Rubner and Kutner, P.C., to execute a "Settlement Agreement" under the threat of abandonment of their representation one week before a scheduled trial on the issue of a mining lease rejection. At the time, it was unknown to Petitioners, and their

counsel did not advise, that said Settlement Agreement, creating both a new lien through debt of $215,000.00, and a new preferential creditor, Frontier Materials, Inc., was violative of 11 U.S.C. 362(a)(4)(5). Bankruptcy Judge Charles E. Matheson approved said Settlement Agreement and authorized Petitioners to proceed as necessary to consummate said agreement. Petitioners Ronald W. Gregory, Dorothy L. Gregory, and Ronald W. Gregory, Jr., relying on said Settlement Agreement committed their respective assets into the mining project. Petitioner Ronald W. Gregory Jr. also recruited others to invest money as well, thereby creating a fiduciary duty necessitating his joining in this action.

On February 26, 1988, Bankruptcy Judge Charles E. Matheson, notwithstanding Petitioners' readiness to commence mining operations and their full performance to the court-approved Settlement Agreement, cited 11

U.S.C. 1112(b) and disregarded Frontier Materials, Inc. actions violative of 18 U.S.C. 1961, without motion from a "party in interest", and without just "cause" converted their Chapter 11 Reorganization to Chapter 7 Liquidation, Sua Sponte.

On March 15, 1988, Petitioners timely filed their 'Notice of Appeal' from conversion to the United States District Court. On March 31, 1988, Chief Judge Sherman G. Finesilver denied Petitioners' appeal citing same as being 'not timely filed'. Petitioners appealed said United States District Court denial to the Court of Appeals for the Tenth Circuit. On February 22, 1989, said Appellate Court reversed Judge Finesilver's ruling and reinstated Petitioners' appeal.

On February 27, 1989, Petitioners submitted a "Renewed Motion For Stay Pending Appeal". On March 21, 1989, Bankruptcy Judge Sidney B.

Brooks denied said motion with a warning that Petitioners were not to file further papers or motions under threat of sanctions, said order being violative of the First, Fifth and Fourteenth Amendments of due process and access to the courts.

On April 18, 1989, Bankruptcy Judge Sidney B. Brooks denied Petitioner Ronald W. Gregory, Jr.s' Motion to Intervene, individually and as fiduciary to investors, said order being violative of First, Fifth and Fourteenth Amendments of due process and access to the courts.

In April 1989, Petitioners responded to a Colorado State Court Motion For 'Writ of Restitution' filed by Frontier Materials, Inc. on Petitioners' reorganization property by timely filing a Petition for Removal to United States District Court and demanding a trial by jury. Chief Judge Sherman G. Finesilver, citing

28 U.S.C 157(a), referenced the action to Bankruptcy Court where a jury cannot be had. Bankruptcy Judge Patricia A. Clark did not remand, pursuant to 28 U.S.C 157(b)(3), said action to United States District Court, but rather, entered a default judgment against Petitioners notwithstanding they had demanded a jury trial and had been denied access to the Bankruptcy Court through warnings and threats of sanctions by Bankruptcy Judge Sidney B. Brooks, and were, therefore, deprived of property and rights violative of First, Fifth, Seventh, and Fourteenth Amendments.

Bankruptcy Court lacks statutory authority to conduct jury trial in adversary proceeding. In re United Missouri Bank of Kansas City, N.A., 901 F.2d 1449, 20 BCD 644 (CA8 1990).

The United States District Court did not withdraw reference, pursuant to 28 U.S.C. 157(d). Jury trials in bankruptcy proceedings

must take place in the District Court sitting in its original jurisdiction in bankruptcy. In re Kaiser Steel Corp., 911 F.2d 380, 20 BCD 1418 (CA10 1990). Said foregoing denial of jury trial was violative of the Seventh Amendment, Federal Rules of Civil Procedure Procedure 81(c) and 38(a)(b)(c). Besides being deprived of trial by jury, Petitioners were deprived of their mining property violative of First, Fifth, and Fourteenth Amendment and 11 U.S.C. 362 (d)(2)(A)(B).

In the foregoing grievances, each judicial officer named violated Article VI of the United States Constitution.

STATEMENT OF THE CASE

When implementing Chapter 11 of Title 11 of the United States Code, and specifically in this case, an entity in financial trouble is intended to be provided a lawful means for which to seek protection from creditors for a time sufficient

to formulate a method to reorganize their financial affairs so as to be able to service their rightful debts.

The record within the Bankruptcy Court for the District of Colorado reveals a distinct lack of success of Chapter 11 petitioners - less than one (1%) percent. Said low percentage implies that said forum is 'creditor oriented' rather than 'debtor oriented'. The Code is designed to help the debtor pay the creditor. The Code is not intended to 'set the stage' to destroy a debtor.

The relief herein sought is not available, and there are no adequate remedies in any other court other than this Court, for the following reasons:

a. Petitioners' experiences reveal the flourishing of prejudice and bias, as the courts in Colorado have refused to grant Petitioners any relief, and statements emanating from the

United States Trustee's office is that the courts in the District of Colorado will not grant relief to the Petitioners herein. For Petitioners' defenses in said matter, sanctions have been imposed, and incarceration has been threatened.

This petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit, for their AFFIRMATION of the MEMORANDUM OPINION AND ORDER issued by Honorable Juan G. Burciaga, sitting by designation for the United States District Court for the District of Colorado; together with the JUDGMENT, entered by the United States District Court Chief Deputy Clerk Stephen P. Ehrlich, being Civil Action No. 90-JB-551 of said District Court; Appeal No. 91-1011 of said Court of Appeals, as ruled upon by said court, alleged certain issues not accurately represented as being at issue in the Complaint, as is more fully hereinafter alleged

and argued, including deprivations of strict Constitutional and legal rights warranting full, impartial and unbiased determinations necessary to preserve and fulfill the intent of the Law.

Petitioners have inserted the question of degree of "power" vested in the title and authority of 'Chief Deputy Clerk of the United States District Court'. The question is - what power is vested in a Chief Deputy Clerk granting authority to <u>expand</u> on the "Orders" of a federal judge. The answer is necessary to determine the 'force of law' possessed by said Chief Deputy Clerk as affecting the rights of Petitioners herein, since the added phrase "action and complaint are dismissed <u>with prejudice</u>, and the Court of Appeals AFFIRMED dismissals with prejudice. Petitioners acknowledge that the Federal Defendants 'Motion to Dismiss' contained the phrase "with prejudice". However, Defendant Wabeke's 'Motion to Dismiss' merely asked that

because of the alleged deficient service, that "all claims...be dismissed".

Petitioners' brief quoted Stump v. Sparkman, 435 U.S. 349, 357 on page 19 which the Court of Appeals quotes in its Memorandum and Opinion, citing the defense of "absolute judicial immunity". Appellants have no quarrel with this decision of the United States Supreme Court. However, as Appellants' brief attempted to call to the Court of Appeal's attention, said "absolute judicial immunity" is not applicable when a judge acts "in the clear absence of all jurisdiction". Stump v. Sparkman, 435 U.S. 349, 356, 357. citing Bradley v. Fisher, 13 Wall, 335, 351.

If a judge rules contrary to the law, Petitioners contend a judge acts "in clear absence of all jurisdiction" and by Article IV, Section 1. and Section 2., and Article VI, is therefore, in violation of his/her Oath as

required to support the "Constitution, and the laws made in pursuance thereof..."

A. Bankruptcy Judge Charles E. Matheson.

1. Judge Charles E. Matheson presided over Petitioners' case from May 1986 through January 3, 1989.

2. Petitioners filed a motion to reject a mining lease with Frontier Materials, Inc. pursuant to Bankruptcy Rule 6006(a)(c) upon advise of counsel. Said motion to reject was scheduled for trial on August 28, 1986.

3. A "Settlement Agreement", forced upon Petitioners by their counsel, Rubner and Kutner, P.C., was entered into by Petitioner Ronald W. Gregory, and Frontier Materials, Inc. on August 21, 1986.

4. Judge Matheson, by Order, approved the 'Settlement Agreement' on September 8, 1986, which agreement was later discovered by Petitioners to be violative of 11 U.S.C.

362(a)(4)(5).

5. Notwithstanding Petitioners' full performance of the Settlement Agreement, and the protective proviso of its Section 10, Judge Matheson denied Petitioners' objection, on January 19, 1988, to the acts of opposition by Frontier Materials, Inc. to Petitioners' reorganization efforts.

6. Judge Matheson, sue sponte, converted Petitioners' Chapter 11 reorganization to Chapter 7 liquidation, on February 26, 1988, in a manner violative of 11 U.S.C. 1112(b), which statute requires:

a. a 'motion for conversion' from a party in interest; and

b. 'cause' for conversion must be present.

7. On March 15, 1988, 'Notice of Appeal' was timely filed by Petitioners. On April 14, 1988, Judge Matheson denied their 'motion for

stay pending appeal' on motion by Frontier Materials, Inc.

8. On December 9, 1988, notwithstanding Petitioners' objections and pending appeal, Judge Matheson sold Petitioners' reorganization property to Frontier Materials, Inc. on application of Respondent Wabeke. Respondent Wabeke included in the 'sale':

a. the Court approved the Settlement Agreement, but however, refused to enforce the terms therein. Notwithstanding, Wabeke did not assume said contract pursuant to 11 U.S.C. 365(d)(1) but by including the Settlement Agreement in the sale to Frontier Materials, Inc. deprived Petitioners' of 'contracted-for' protective provisos of:

i. retention of $255,000.00 valued 17 acres together with improvements thereon;

b. $120,000.00 water stock, which stock, by contract and Court Order, was to be returned to the estate in the event that Petitioners did not commence mining.

9. On December 9, 1988, Petitioners discovered evidence of the existence of Judge Matheson's personal Prejudice and Bias against Petitioners. Said personal prejudice and bias against Petitioners prevented fair and impartial hearings.

10. On January 3, 1989, Judge Matheson recused himself pursuant to Petitioners' 28 U.S.C. 144 motion of prejudice and bias.

B. Bankruptcy Judge Sidney B. Brooks.

1. On January 5, 1989, Judge Brooks was appointed to replace Judge Matheson and the case number was changed to 86 B 0476 A.

2. Judge Brooks scheduled a January 13, 1989 hearing to hear Petitioners' 'motion for new trial'. Petitioners were not notified by the

Bankruptcy Court of said hearing.

3. On January 9, 1989, Petitioners filed a 'motion to transfer proceedings' to the District of Wyoming.

4. On January 13, 1989, Judge Brooks stating that the 'motion to transfer' was "not before him", and contrary to Local Rule 23 requiring notification to all parties in interest, nonetheless denied said motion.

5. On January 13, 1989, Judge Brooks denied Petitioners' 'motion for new trial' notwithstanding the pending 'motion to transfer' proceedings. Said ruling outside procedural order, violated Petitioners Fourteenth Amendment rights of due process.

6. On February 27, 1989, after the Court of Appeals' February 22, 1989 reversal of the United States District Court's denial of Petitioners' conversion appeal, Petitioners filed with the Bankruptcy Court a "Renewed

Motion For Stay Pending Appeal". Judge Brooks denied said motion on March 21, 1989.

7. On March 21, 1989, Judge Brooks warned Petitioners' not to file further motions, papers, etc. with the Bankruptcy Court under the threat of sanctions. Said warning and threat intending to deprive Petitioners of access to the court to defend their properties and rights was in violation of Petitioners' First, Fifth, and Fourteenth Amendment rights and Article VI of the Constitution of the United States.

8. On April 18, 1989, after Respondent Wabeke seized and converted the investors' Certificate of Deposit which they posted as a bond to protect the Colorado State mining permit, Judge Brooks denied Petitioner Ronald W. Gregory, Jr. his 'motion to intervene' as fiduciary to those parties providing money and equipment for the planned mining operation, which denial was a violation of First, Fifth,

Fourteenth Amendments and Article VI of the Constitution of the United States.

9. On April 18, 1989, Judge Brooks, in which Petitioners allege an abuse of authority, allowed sanctions against Petitioners stating that they failed to heed his March 21, 1989 warning and threat.

10. On June 20, 1989, Judge Brooks entered sanctions against Petitioners pursuant to his April 18, 1989 'findings'.

11. On January 25, 1990, Judge Brooks, stating Petitioners' violation of the automatic stay of 11 U.S.C 362, ordered Petitioners to cease and desist in their actions against Frontier Materials, Inc. in Colorado State Court. He further ordered Petitioners to bring any action against Frontier in his Court notwithstanding such action in Bankruptcy Court would deprive Petitioners of jury trial. Said deprivation of a jury trial in state court

deprived Petitioners of their Seventh Amendment rights guaranteed by the United States Constitution and violative of 11 U.S.C. 362(a). 11 U.S.C 362(a) only stays proceedings against a debtor and actions by debtor are not stayed. Carley Capital Group v. Fireman's Fund Ins. Co., 889 F.2d 1126, 19 BCD 1754, (CA DC 1989).

C. Bankruptcy Judge Patricia A. Clark.

1. On May 18, 1988, Judge Clark ruled that Petitioners had no standing to defend their position as parties in interest in her Court, violative of First, Fifth, and Fourteenth Amendments and Article VI of the Constitution of the United States.

2. a. In April 1989, the United States District Court referenced to the Bankruptcy Court a 'Writ of Restitution' action removed from Colorado State Court where, in said removal, a jury trial was demanded.

b. Petitioners, on March 21, 1989, had been warned and threatened not to file further motions, papers, etc. in the Bankruptcy Court. They believed that they were precluded, under the penalty of sanctions, from filing motions or papers of any kind, therefore said warning and threat being violative of the First, Fifth, and Fourteenth Amendments.

c. Judge Clark did not remand the case to the United States District Court for its inability to provide the demanded jury trial. Said failure was violative of Petitioners Seventh Amendment rights and of the Federal Rules of Civil Procedure 38 and 81(c).

> "These rules apply to civil actions removed to the United States District Court from state courts and govern procedure after removal...If at the time of removal all pleading have been served, a party entitled to jury trial shall be accorded it..."
>
> "If a jury trial had been requested, and case is one sufficiently related to bankruptcy proceeding to remain in Federal Court, the case should be heard by Federal District Judge in the first instance." [Emphasis added].

In re American Energy, Inc., 50 BR 175 (BR ND 1985)

3. The United States District Court did not withdraw reference to permit the demanded jury trial. Said failure was violative of Petitioners Seventh Amendment rights and Federal Rules of Civil Procedure 38 and 81(c).

4. In April 1989, Judge Clark entered a default judgment against Petitioners and granted a 'Writ of Restitution' to Frontier Materials, Inc., acts violative of Petitioners' Fifth and Fourteenth Amendment rights and of Article VI of the Constitution of the United States.

D. Chief Judge Sherman G. Finesilver.

1. On March 15, 1988, Petitioners timely filed their 'Notice of Appeal' from their conversion to Chapter 7 from Chapter 11.

2. On March 31, 1988, United States District Court Chief Judge Finesilver, ruling pursuant to a written statement from the Bankruptcy Court, and contrary to Rule, denied

Petitioners' appeal as being 'untimely filed'. Said ruling, in conjunction with the statement from the Bankruptcy Court, is indicative of an act prohibited by 18 U.S.C. 241 and Article VI of the United States Constitution denying Petitioners rights as defined in Article IV, sections 1. and 2..

3. Petitioners appealed the Order denying their conversion appeal to the Court of Appeals for the Tenth Circuit in April 1988.

4. On February 22, 1989, the Court of Appeals reversed Judge Finesilver's Order and reinstated Petitioners' appeal from conversion.

5. In a separate action, in April 1989, Petitioners removed a 'Writ of Restitution' action, (also stated in C.2., above) from Colorado State Court to the United States District Court where a trial by jury was properly demanded.

6. Judge Finesilver referenced said action to the Bankruptcy Court where a jury cannot be had, violative of Petitioners' Seventh Amendment rights and Federal Rules of Civil Procedure 38 and 81(b).

> "If bankruptcy judge could not preside over jury trial, cause would have been shown to withdraw reference...where defendant had timely requested...and were entitled to jury trial under the Seventh Amendment...District court may withdraw reference case on own motion...as congressional intent that bankruptcy proceedings...would be overcome...in favor of jury trials preserved by Seventh Amendment..."
>
> In re Price-Watson Co., 66 BR 144 (BR SD Tex 1986)

> "Classification of bankruptcy matter as "core proceeding" does not eliminate litigant's constitutional right to jury action which is one at law."
>
> Matter of Kenval Marketing Corp., 65 BR 548 (ED Pa 1986).

7. Judge Finesilver did not withdraw reference and Petitioners were deprived of a trial by jury and property together with deprivation of Petitioners' First, Fifth, and Fourteenth Amendment rights through a Bankruptcy

Court default judgment. Said default judgment occurred through denial of access to the Bankruptcy Court, pursuant to warning and threats issued by the Bankruptcy Court.

E. Ross J. Wabeke, Alleged Trustee.

The Bankruptcy Court record docket does not reflect appointment of Ross J. Wabeke as trustee of the Gregory Estate pursuant to Bankruptcy Rules 5001(a) and 5003(a), and therefore Wabeke is an entity not determined to be lawfully representing the United States through the Department of Justice, or as an independent party.

As to the alleged "absolute immunity" of Ross J. Wabeke, Petitioners have called to the attention of the courts, the following:

1. Ross J. Wabeke, who alleges to be the trustee in the bankruptcy case, has acted outside of his fiduciary duties violative of the Fourth Amendment by seizure of $31,554.00

Certificate of Deposit and mining equipment, which resulted in loss of property of Petitioner Ronald W. Gregory, Jr., and others.

2. Application of Ross J. Wabeke to seize money ($31,554.00) of, and to sell equipment through theft from, others not subject to Bankruptcy Court jurisdiction combined with denial to said owners of the right to intervene to defend their property.

3. Funds derived from sale of the mining equipment and conversion of the Certificate of Deposit were not estate assets, and through misrepresentation to the court as to ownership, Wabeke has been awarded a part of said funds.

4. Respondent Wabeke has failed to perform his fiduciary duties as specified in 11 U.S.C. 704 and thus, acted to deprive all Petitioners of rights and properties.

Petitioners state that if Ross J. Wabeke is not an officer of the court, and therefore, not

an officer of the United States, then Petitioners have no reason to challenge his dismissal by reason of 'service'. However, if Ross J. Wabeke is deemed to be an officer of the court, therefore an officer of the United States, then Petitioners assert that service was proper pursuant to FRCP Rule 4(d)(5). Notwithstanding, Petitioners are entitled to a redress of grievances for Wabeke's actions.

The need for these issues to be addressed and the questions, heretofore presented, to be answered is essential.

The 'mining bond of $31,554.00' and 'equipment', total value in excess of $300,000.00 which has been seized, converted and sold to Frontier Materials, Inc., in part, for $41,100.00, was never part of the Gregory Estate. By dismissing the foregoing as "without merit" merely permits the courts to dispose of pro se litigants, their property, property of

persons not subject to the Bankruptcy Code, and other rights under the Law, and to avoid ruling on the Constitutional guarantee of the right to obtain justice according to law.

Case law opposes the issue of 'immunity' as to the facts in this instant case.

> "A trustee may be sued for conversion, trespass and for money had and received because of wrongful refusal to return a deposit." In re Kalb & Berger Mfg. Co., 165 F. 895 (2nd Cir. 1908).

The ruling that a trustee is to be granted "absolute immunity" when performing an order of the Court is not challenged. Wabeke, when seizing said Certificate of Deposit and mining equipment was not performing orders of the Court. Not stated was, that said 'cloak of immunity', as applied in this instant case, grants immunity to acts of fraud and fraudulent misrepresentation. So, as it stands in the published ruling, a trustee is permitted to misrepresent himself, his acts or his

applications, to the court, and the court, who has previously denied access to the court by depriving motion to intervene to owners of money and equipment outside of the estate, prevents defense from theft by an alleged trustee, whose acts of theft were authorized after the fact through said court's order. If "absolute immunity" is granted for a theft obtained through 'color of office', and authorized by court order approving said theft, then from whom can one seek a redress of grievances from a potentially corrupt court process? Quoting from Petitioners' Petition For Rehearing, - "With this ruling, the system is closed and impenetrable. Injustice is made 'just'. Where, then, under the law, can the aggrieved seek, and find, justice?"

The ruling of the lower courts granting 'quasijudicial immunity' to one who has not been appointed pursuant to law, one whose status as

an 'employee' or an 'independent contractor' has not been determined, and affirming dismissal with prejudice when Wabeke did not ask for dismissal with prejudice. Said dismissal with prejudice occurred only by enlargement by the Chief Deputy Clerk Stephen P. Ehrlich in the 'Judgment' issued on the United States District Court's 'Memorandum and Opinion'.

Such dismissal with prejudice has acted to prevent instant, and further, claims against Wabeke, thus permitting theft under the color of law.

REASON FOR GRANTING THE WRIT

THE PROPER REMEDY FOR DETERMINING THAT THE ACTS OF THE RESPONDENTS WERE PURSUANT TO LAW, IS:

1. ORDER A TRIAL ON THE MERITS OF THE COMPLAINT; OR IN THE ALTERNATIVE

2. TO ORDER AN INVESTIGATION INTO THE BANKRUPTCY CASE 86 B 0476 G AND 86 B 0476 A AS

AUTHORIZED BY 11 U.S.C. 3057.

Petitioners ask any one Judge to order an investigation into this case pursuant to 18 U.S.C. 3057 for the overwhelming elements of fraud.

In this case, the laws enacted by Congress, specifically, Title 11 of the United States Code, Sections 362(a)(4)(5); 362(d)(2)(B); 1112(b); need no interpretation. Section 1112(b) sets forth specific authority and restrictions. Both authority and restrictions were ignored. Petitioners have been deprived of the intent of the Code. Petitioners have been illegally deprived of property. Petitioners have been deprived of the rights guaranteed to them by the Constitution of the United States and Articles IV and VI of the Constitution. Petitioners have a right to have their grievances heard by a jury but have, on at least two occasions, been deprived of trial by jury, and of trial.

ARGUMENT

Article VI states duties of a judge, among which are that a judge "shall be bound" to the Constitution and the Laws of the United States as the supreme Law of the Land. Petitioners do not believe it necessary to counsel a judge on the Law. Petitioners proceed pro se by necessity - not by choice. But, notwithstanding Petitioners' inexperience, the law of their case is clear and unambiguous.

Contrary to the "published" Opinion, Petitioners have not asked for the "entire Bankruptcy Code to be declared unconstitutional". That statement of the Court of Appeals is incorrect should not be allowed to stand in published case law. Title 11 of the United States Code, Sections 362(a)(4)(5) and 362(d)(2)(B) are cited as law prohibiting the creation of new liens and of new preferential creditors. Section 365(d)(1) is cited as law

prohibiting the sale of the property and Settlement Agreement depriving Petitioners of rights contained therein. Section 1112(b) has been challenged as to the order for conversion which was not in accordance with said law. Section 1129 is cited since Petitioners conformed to the requirements of said section, and by so qualifying them for confirmation of their reorganization plan, they should have been granted the opportunity to perform pursuant thereto.

Deprivation of rights granted to citizens under the Constitution, particularly when said citizens performed pursuant to the law, is not consistent with Article IV of the Constitution wherein citizens are entitled to rely on the law, and in Article VI of the Constitution, citizens are entitled to rely upon the Oath made by judges pledging to uphold the Constitution and the Laws of the United States made in

pursuance thereof.

Petitioners believe the hereinabove named deprivations of law and right by those judges named, were "acts in clear absence of all jurisdiction". A ruling from the bench in violation of Article VI is not a judicial act. Said acts which are not "judicial" do not qualify for "absolute immunity".

Petitioners adhered to the law as counsel advised, when counsel were involved. Petitioners, as pro se litigants, adhered to the law as they understand the law to be. Petitioners have a right to rely on Statute Law and on Constitutional Law, and to conduct themselves as the law permits. The courts have complained of Petitioners' actions of defense in right and property. Petitioners have been deprived of those rights hereinabove stated.

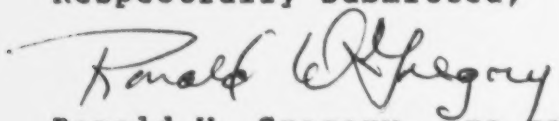
CONCLUSION

In conclusion, certiorari should be granted because this case involves several important issues of law which have not been considered by this Court. Those issues are of the application of Title 11 of the United States Code by the Courts in the District of Colorado, and the applications of the Constitution by the Courts in the District of Colorado toward the rights of the Petitioners. Since the intent of the Bankruptcy Code is clear, the law is clear, and the Constitution is clear, it is essential not only to the Petitioners herein, but to those citizens who rely on the Laws and the Constitution of the United States.

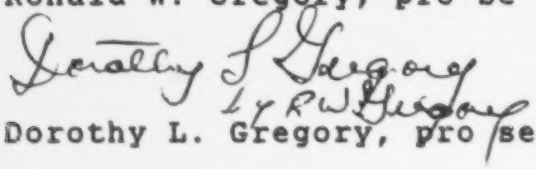
Petitioners, Ronald W. Gregory, Dorothy L. Gregory, Ronald W. Gregory, Jr., and the Gregory Estate request that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

Dated March 25, 1992.

Respectfully submitted,

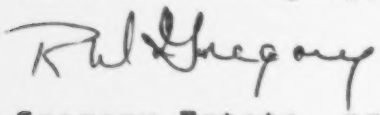


Ronald W. Gregory, pro se



Dorothy L. Gregory, pro se

Ronald W. Gregory, pro se



Gregory Estate, pro se

Mailing Address:
c/o J. Bayne
P.O. Box 29773
Thornton, CO 80229-0773

AFFIDAVIT OF SERVICE

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

I hereby certify that, pursuant to Rule 29.3., I served one copy of the foregoing Petition For Writ of Certiorari on each of the Parties herein, by depositing same in the United States mail, certified mail, return receipt, or by delivering the copy personally, to the following:

Michael S. McCarthy	William G. Pharo
Faegre and Benson	Asst. U.S. Attorney
370 17th Street #2500	633 17th St. #1600
Denver, CO 80202	Denver, CO 80202

All known parties required to be served have been served.

Ronald W. Gregory

Ronald W. Gregory

Subscribed and sworn to before me on March ~~24~~ 23, 1992.

Notary Public

My Commision Expires 11-5, 1992.

APPENDIX A

Opinion of the Court of Appeals for the Tenth Circuit in Gregory v. United States, et al., 942 F.2d 1498 (10th Cir. 1991).

JUDGE BOBBY R. BALDOCK delivered the opinion of the Court:

Plaintiff-appellants appeal from the district court's order granting judgment in favor of the defendants and dismissing their complaint with prejudice. Plaintiffs Ronald W. Gregory and Dorothy L. Gregory are debtors in an underlying bankruptcy. Plaintiff Ronald W. Gregory, Jr. was involved in the business ventures with the debtors. This action has its genesis in plaintiffs' dissatisfaction with bankruptcy and related proceedings. In the main, plaintiffs sought damages against the defendants, alleging a myriad of federal constitutional and state law claims. They also sought a stay of all bankruptcy proceedings pending consideration of this case. Finally,

they asked that the bankruptcy code be declared unconstitutional. All defendants filed motions to dismiss. See Fed. R. Civ. P. 12(b).

Under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), the district court first dismissed the judicial defendants(Judge Finesilver and Bankruptcy Judges Matheson, Clark and Brooks) based on absolute judicial immunity. see Stump v. Sparkman, 435 U.S. 349, 356-57 (1978). Then the district court dismissed the governmental defendant (United States, federal district and bankruptcy courts) based on sovereign immunity. See United States v. Testan, 424 U.S. 392,399 (1976). Finally, relying on Fed. R. Civ. P. 12(b)(5), the district court dismissed the defendant bankruptcy trustee (Mr. Wabeke) because the plaintiffs attempted to serve the summons and complaint by leaving a copy with the secretary at the trustee's law firm. See Fed. R. Civ. P. 4(d)(1); Day-Murphy v. Winston, 837 F.2d

348, 355 (9th Cir. 1987); Pollack v. Meese, 737 F.Supp. 663, 666-67 (D.D.C. 1990). All dismissals were with prejudice.

Liberal construction is accorded the pro se pleadings in this case. Haines v. Kerner, 404 U.S. 519, 520 (1972); Jaxon v. Circle K Corp., 773 F.2d 1138, 1140 (10th Cir. 1985); Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). In reviewing a district court's decision on a motion to dismiss for failure to state a claim, the allegations of the complaint are accepted as true and dismissal of the complaint is warranted "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Applying these standards, the district court's dismissal of the complaint, insofar as it seeks money damages, against the judicial and governmental defendants is affirmed based on

absolute judicial and sovereign immunity. Although plaintiffs sought to have the entire bankruptcy code declared unconstitutional, the complaint lacks any legal or factual specificity which would allow us reasonable to read the pleadings as stated a recognized claim, despite the plaintiffs' nonlawyer status. See Hall, 935 F.2d at 1109-10. Thus, insofar as the complaint seeks declaratory and injunctive relief, the dismissal of the complaint is affirmed.

The district court's dismissal with prejudice of the trustee is slightly more complex. The general rule is that "when a court finds that service is insufficient but curable, it generally should quash the service and give the plaintiff an opportunity to re-serve the defendant." Pell v. Azar Nut Co., 711 F.2d 949, 950 n.2 (10th Cir. 1983). In this case, proper service of process would be futile, however, because, after stripping the complaint of its

many unsupported legal conclusions, see Hall, 935 F.2d at 1110, plaintiffs seek to hold the trustee liable for executing the bankruptcy court's orders concerning the collection and disposition of estate property. For example, plaintiffs seek to recover on claims that the trustee, in the course of regular bankruptcy proceedings, obtained and executed bankruptcy court orders authorizing the sale of the mining property and declaring the mining bond property of the estate.

In T & W Inv. Co. v. Kurtz, 588 F.2d 801 (10th Cir. 1978), we held that a state court receiver following the orders of a state district court judge was absolutely immune from civil liability on civil rights claims concerning the application and disposition of receivership assets, Id. at 802-03. Like the plaintiff in T & W, the plaintiffs in this case had opportunity and did object throughout the

underlying proceedings. The debtors have appealed virtually every order of the bankruptcy court, including the order converting the case from chapter eleven to chapter seven bankruptcy and orders allowing the sale of real property and equipment. This case is indistinguishable from T & W which we have followed in granting absolute immunity to those executing facially valid judicial orders. See Turney v. O'Toole, 898 F.2d 1470, 1472-74 (10th Cir. 1990); Vasquez v. City and County of Denver, 878 F.2d 1285, 1287-88 (10th Cir. 1989). Thus, it "appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief" and the district court's dismissal of the trustee with prejudice should be upheld. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

We recognize that this issue had not yet been raised below because the trustee sought a

Rule 12(b)(5) dismissal which the district court granted. Still, sua sponte invocation of Rule 12(b)(6) on appeal may be appropriate in those rare instances in which a plaintiff cannot recover on the complaint because of a dispositive issue of law, see Neitzke v. Williams, 490 U.S. 319, 327 (1989), and amendment would be for naught.

> Although dismissals under Rule 12(b)(6) typically follow a motion to dismiss, giving the plaintiff notice and an opportunity to amend his complaint, a court may dismiss sua sponte "when it is 'patently obvious' that the plaintiff could not prevail on the facts alleged, and allowing him an opportunity to amend his complaint would be futile."

Hall, 935 F.2d at 1109-10 (quoting McKinney v. Oklahoma, 925 F.2d 363, 365 (10th Cir. 1991) which quoted Baker v. Director, United States Parole Comm'n, 916 F.2d 725 (D.C. Cir. 1990 (per curiam) and cited Huxall v. First State Bank, 842 F.2d 249, 240 n.2 (10th Cir. 1988)). Appellate courts are not "required...to remand

in futility," 476 U.S. 747, 756-57 n.7 (1986); thus, we also affirm the district court's judgment dismissing the complaint against the trustee with prejudice. AFFIRMED.

APPENDIX B

The unpublished Memorandum Opinion and Order of the United States District Court for the District of Colorado in Gregory, et al. v. United States, et al., Civil No. 90-JB-551, filed December 19, 1990.

Memorandum Opinion and Order.

THIS MATTER is before the Court on Defendants' motions to dismiss. Having reviewed the pleadings, affidavits and the relevant law, the Court finds Defendants' motions to dismiss are well taken and will be granted.

Plaintiffs filed suit pro se against Defendants for breach of contract, breach of implied contract, interference with contract, breach of fiduciary duties, negligence, misrepresentation, conversion, violations of the first , fourth, fifth, seventh, and fourteenth amendments to the United States Constitution,

violations of 11 U.S.C. 1101, 363, 18 U.S.C 241 and 42 U.S.C 1981, 1983, 1985, 1986.

Defendants filed two motions to dismiss arguing: the United States, the United States District Court for the District of Colorado, the United States Bankruptcy Court, the Honorable Charles E. Matheson, the Honorable Patricia A. Clark, the Honorable Sidney B. Brooks, and the Honorable Sherman G. Finesilver are absolutely immune from civil liability; Plaintiffs failed to allege any facts supporting a claim against Judge Finesilver; and Plaintiffs defectively served process on Defendant Wabeke, the Interim Trustee.

For the purposes of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), the material allegations of the complaint must be accepted as true. Gladstone, Realtors v. Bellwood, 441 U.S. 91, 109 (1979); Franklin v. Meredith, 386 F.2d 958, 959 (10th

Cir. 1967). The complaint or a portion thereof should not be dismissed unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The Court shall construe the pleadings liberally, and if there is any possibility of relief the case should not be dismissed. Scheuer v. Rhodes, 416 U.S. at 236; Gas-a-Car Inc. v. American Petrofina, Inc., 484 F.2d 1102, 1107 (10th Cir. 1973). For purposes of a motion to dismiss for lack of subject matter jurisdiction or defective service of process, the court may consider evidence outside the pleadings, including affidavits, without converting the proceeding to one for summary judgment. Wheeler v. Hurdman, 825 F.2d 257 n.5 (10th Cir. 1987); Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982); see also 2A J. Moore,

Moore's Federal Practice, 12.09[3] (2d ed. 1990).

In addressing these motions, the Court is mindful of Plaintiffs' pro se status and the well-settled rules compelling liberal construction of pleading entered by litigants proceeding pro se. Haines v. Kerner, 404 U.S. 519, 520 (1972); Jaxon V. Circle K Corp., 773 F.2d 1138, 1140 (10th Cir. 1985). Consequently, Plaintiffs' complaint is not to be held to standards as stringent as those governing formal pleadings drafted by lawyers. Hughes v. Rowe, 449 U.S. 5, 9 (1980) (per curiam); Haines v. Kerner, 404 U.S. at 520; Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

ABSOLUTE IMMUNITY

When judges are performing "judicial acts" they are absolutely immune even when they act erroneously, maliciously, or in excess of their judicial authority. Van Sickle v. Holloway, 791

F.2d 1431 (10th Cir. 1986) (citing Stump v. Sparkman, 435 U.S. 349, 356-357 (1978)). Whether an act is a 'judicial' one relates to the nature of the act itself and whether it is a function normally performed by a judge, or done in a judicial capacity. Stump, 435 U.S. at 362. Additionally, the United States and the courts, as instrumentalities of the United States, are absolutely immune from liability unless Congress has expressly waived sovereign immunity. United States v. Testan, 424 U.S. 392, 399 (1975); Ascot Dinner Theater v. Small Business Admin., 887 F.2d 1024, 1027 (10th Cir. 1989).

In this case, even affording pro se Plaintiffs the utmost latitude, Plaintiffs have alleged no facts which would entitle them to relief. With regard to the judges, Plaintiffs base their claims on actions taken by each judge while issuing orders in their judicial capacity. As such, all of the alleged acts are "judicial

acts" and Defendants Judge Matheson, Judge Clark, Judge Brooks, and Judge Finesilver are entitled to absolute immunity. Moreover, with regard to Judge Finesilver, Plaintiffs have failed to allege any facts whatsoever. Therefore, on this basis alone, Plaintiffs have failed to state a claim against Judge Finesilver. With regard to the United States, the United States District Court for the District of Colorado, and the United States Bankruptcy Court are entitled to absolute immunity. Accordingly, Defendants' motion to dismiss the above Defendants will be granted.

DEFECTIVE SERVICE OF PROCESS

Defendant Wabeke, in a separate motion, moves to dismiss Plaintiffs' claims against him pursuant to Fed. R. Civ. P. 12(b)(5) arguing that Plaintiffs defectively served process.

Process may be served on an individual by delivering a copy of the summons and complaint

to the individual's dwelling house or to an agent that is appointed to receive service of process. Fed. R. Civ. P. 4(d)(1). However, a person's place of employment does not constitute a dwelling house within the meaning of Rule 4(d)(1). See 2 J. Moore, Moore's Federal Practice 4.11[2] (2d ed. 1990); Daly-Murphy v. Winston, 837 F.2d 348, 355 (9th Cir. 1987).

In this case, Plaintiffs left the complaint and the summons with Sharon Marie Dvoracek at Defendant Wabeke's place of employment. (Dvoracek affidavit). Defendant Wabeke had not appointed Ms. Dvoracek to receive service of process on his behalf. (Wabeke affidavit). Accordingly, Plaintiffs' service of process was defective and Defendant Wabe[c]ke's motion to dismiss will be granted.

Wherefore,

IT IS ORDERED, ADJUDGED, AND DECREED Defendants' motions to dismiss be, and hereby

are, granted.

DATED this 19th day of December, 1990.

ss

Juan G. Burciaga
Chief U.S. District Judge
for the District of New Mexico
Sitting by Designation

APPENDIX C

Judgment of the United States District Court for the District of Colorado by Chief Deputy Clerk Stephen P. Ehrlich, in Gregory, et al. v. United States, et al., dated December 27, 1990, Civil Action No. 90-JB-551.

JUDGMENT

Pursuant to and in accordance with the Memorandum Opinion and Order signed by Chief Judge Juan G. Burciaga for the District of New Mexico sitting by designation and filed on December 19, 1990, which is incorporated herein by reference as is fully set forth, hereby

ORDERS that judgment is entered on behalf of the Defendants and against Plaintiffs in that the action and complaint are hereby dismissed with prejudice.

It is FURTHER ORDERED that each party shall bear their own costs.

DATED at Denver, Colorado this 27th day of December, 1990.

FOR THE COURT:

by ss
Stephen P. Ehrlich